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In The

Supreme Court of the United States

October Term, 1991

FRANK FORREST, *et al.*,

Petitioners,

v.

WASHINGTON STATE ELECTRICAL CONTRACTORS ASSOCIATION, INC., *et al.*,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE STATES OF ARIZONA AND NEVADA AS AMICI CURIAE SUPPORTING THE STATE OF WASHINGTON'S PETITION FOR WRIT OF CERTIORARI

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INTERESTS OF THE AMICI STATES

The States of Arizona and Nevada ("Amici States") submit this brief in support of the State of Washington's Petition for Writ of Certiorari. The Amici States are located in the Ninth Circuit and regulate trade within state borders and enforce state and federal antitrust laws. The Amici States have a vital interest in ensuring clarity and predictability in the state action immunity doctrine. As regulators of intra-state trade, the Amici States are interested in preserving and protecting basic principles of federalism and state sovereignty. Further, as antitrust law enforcers, the Amici States have an interest in promoting coherence and consistency in doctrines of antitrust immunity.

Many state regulatory boards in the Amici States are affected by the Ninth Circuit decision. These boards perform important functions for the protection and benefit of residents, as authorized by their state legislatures. The Amici States have a substantial interest in promoting legitimate regulatory board action by preventing unwarranted federal judicial inquiry into the subjective motivation of state regulatory board members. That inquiry is inherent in the Ninth Circuit decision in this action.

These various interests of the Amici States intersect with the issues of antitrust immunity for state regulatory board members that are presented in the State of Washington's Petition for a Writ of Certiorari. The Amici States are interested in ensuring that clear guidelines are established for antitrust immunity of state regulatory officials, consistent with congressional intent, this Court's past decisions, and sound public policy.

The Amici States support the contention that the Ninth Circuit improperly considered the subjective motivations of the members of the Washington State Apprenticeship Council and that it needlessly imposes an excessively stringent state supervision requirement on state regulatory board actions. The Amici States agree that direction from this Court on the application of state action immunity to regulatory boards is necessary to avoid confusion and proliferation of spurious antitrust litigation in this area.

ARGUMENT

I. THE NINTH CIRCUIT DECISION OVERTURNS NATIONALLY IMPORTANT PRINCIPLES OF FEDERALISM AND DIRECTLY INTERFERES WITH THE AMICI STATES' LEGITIMATE REGULATORY OBJECTIVES.

Accepted principles of federalism and state sovereignty hold that federal courts will generally defer to state control over the actions of state officers and agents. "In a dual system of government in which, under the Constitution, the states are sovereign . . . an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Parker v. Brown*, 317 U.S. 341, 351 (1942). The Washington state legislature has declared that the Council[1] is a state agency and that Council members are state employees, as are

[1] "Council" refers to the Washington State Apprenticeship Council.

members of other state trade regulatory boards in Washington and the Amici States. WASH. REV. CODE §§ 42.18.030(2) and .130 (1989); ARIZ. REV. STAT. ANN. §§ 38-101 and 38-231 (1991); NEV. REV. STAT. § 281.005 (1991). Accordingly, the legislatively-authorized actions of Council members as state agents and officials bring fully into play *Parker* principles of federalism and state sovereignty.

Parker holds that "nothing in the . . . Sherman Act or its history . . . suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." 317 U.S. at 351. The Ninth Circuit decision does not call into question the critical district court conclusion of law that Council members' activities were "consistent with the state's clearly articulated and affirmatively expressed apprenticeship regulatory policy." Petition for Certiorari, Appendix B at 10a, Conclusion 2. Under *Parker* the Sherman Act should not be used to restrain and penalize the otherwise lawful and proper conduct of state regulatory boards such as the Council.

Apparently, the Ninth Circuit decision is based on the premise that these well-settled principles of federalism and state sovereignty will apply to state board members only if the motives of board members appointed from the private sector are pure. But this Court recently held that judicial inquiry into regulatory motives is contrary to *Parker*:

> Few governmental actions are immune from the charge that they are "not in the public interest" or in some sense "corrupt." . . . *Parker* was not written in ignorance of the reality that determination of "the public interest" in the manifold

> areas of government regulation entails not merely economic and mathematical analysis but value judgment, and it was not meant to shift that judgment from elected officials to judges and juries.

City of Columbia v. Omni Outdoor Advertising, 59 U.S.L.W. 4259, 4262 (U.S. Apr. 2, 1991) (No. 89-1671), 499 U.S. ___, 111 S.Ct. 1344 (1991). Although *City of Columbia* was decided prior to the Ninth Circuit decision below, the Ninth Circuit apparently gave it no weight in this case.

Legislatively-authorized actions of state regulatory boards must be protected in order to ensure effective regulation. The Ninth Circuit decision to the contrary creates an unworkable and unpredictable antitrust immunity test for state regulatory boards. As a result, state trade and professional regulation in the Amici States will be undermined and defeated. Without some assurance of protection for legitimate regulatory decisions, qualified citizens in Arizona and Nevada will refuse to serve on regulatory boards out of fear of personal, joint and several, treble-damage liability. *See City of Columbia, id.* ("If the city of Columbia's decision to regulate . . . is made subject to *ex post facto* judicial assessment of 'the public interest,' with personal liability of city officials a possible consequence, we will have gone far to 'compromise the States' ability to regulate their domestic commerce.' ") (citations omitted). Those citizens who decide to participate despite the financial risk will be deterred from implementing legislative commands to supplant competition with regulation in order to promote important state

interests. Disappointed participants in the state regulatory process will routinely appeal adverse board decisions to the federal judiciary, under federal antitrust law. The federal courts will be asked to review the motives of individual board members in every case. The Ninth Circuit decision invites "the sort of deconstruction of the governmental process and probing of . . . official intent that we have consistently sought to avoid." *Id.*

The ability of regulatory board members to implement state policy without fear of enormous personal liability is imperative in order for vital regulatory action to occur. Regulatory boards in the Amici States implement state policy and conduct essential state functions. State policy decisions are so implemented in a variety of areas, such as health care (boards regulating physicians, physical therapists, nursing and dentistry) and consumer protection (boards regulating accountants, architects, barbers and engineers).[2]

When the legislatures in the Amici States make a policy decision to regulate an industry or a profession by means of a board or commission, antitrust immunity for

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[2] **Arizona:** ARIZ. REV. STAT. ANN. §§ 32-1402 and 1403 (1991) (Board of Medical Examiners); *id.* § 32-1602 (Board of Nursing); *id.* § 32-1702 (Board of Optometry); *id.* § 32-2002 (Board of Physical Therapists); *id.* § 32-1203 (Dental Board); *id.* § 32-302 (Barber Board); *id.* § 502 (Board of Cosmetology); *id.* § 32-701 (Board of Accountancy); *id.* § 32-102 (Board of Technical Registration). **Nevada:** NEV. REV. STAT. § 630.050 (1991) (Board of Medical Examiners); *id.* § 628.035 (Board of Accountancy); *id.* § 623.050 (Board of Architecture); *id.* § 625.100 (Board of Registered Professional Engineers and Land Surveyors).

board or commission members should not depend on "*ex post facto* judicial assessment of 'the public interest' " or individual member's motives. *Id.*

II. THE NINTH CIRCUIT'S INVOCATION OF THE *PATRICK* SUPERVISION TEST IS UNNECESSARY AND INCONSISTENT WITH RECENT DECISIONS OF THIS COURT.

Based on its inquiry into the subjective intent of Council members, the Ninth Circuit decided that certain members may not be public actors. Under the view that certain members therefore were private actors, the Ninth Circuit directed the district court to apply the strict active state supervision test of *Patrick v. Burget*, 486 U.S. 94 (1988).

Automatic application of a *Patrick* state supervision requirement will deny antitrust immunity to many boards in the Amici States. This is true not because there are inadequate safeguards to assure board fidelity to state policy, but because most regulatory schemes in the Amici States do not confer on other state officials the power to veto or override state board decisions, as *Patrick* requires. *Patrick*, 486 U.S. at 93 (1988) ("The State does not actively supervise this restraint unless a state official has and exercises ultimate authority over private privilege determinations.").

Applying the rigorous supervision test of *Patrick*, however, is unnecessary and unwarranted. In the Amici States, effective controls already exist for state regulatory boards. Board decisionmaking must abide strict procedural requirements for notice, public comment, open

hearings, administrative review and judicial review in state court.[3] As public officials, board members are subject to state conflict-of-interest rules[4] Most significantly, Board members are subject to immediate removal by a politically accountable state official.[5] Peremptory removal of board members provides the same constraint on board member's actions as would the state official override power required by *Patrick*.

The Ninth Circuit's invocation of the *Patrick* supervision test as to regulatory board members is inconsistent with *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985). In *Town of Hallie*, this Court explained that the active state supervision requirement "serves essentially an evidentiary function: it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to state

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[3] **Arizona:** ARIZ. REV. STAT. ANN. § 41-1001 (1991). **Nevada:** Ch. 233B NEV. REV. STAT. (1991).

[4] **Arizona:** ARIZ. REV. STAT. ANN. § 38-101; ARIZ. COMP. ADMIN. R. & REGS. 2-5-501 (Standards of Conduct). **Nevada:** Ch. 281 NEV. REV. STAT. (1991).

[5] **Arizona:** The Governor may appoint members to regulatory boards and may also remove the members of the boards. *See, e.g.*, ARIZ. REV. STAT. ANN. § 32-102(B) ("The Governor may remove a member of the board [of Technical Registration] for misconduct, incapacity or neglect of duty."); *id.* § 32-1402 (Board of Medical Examiners); *id.* § 32-1102 (Optometry Board). **Nevada:** In general, board members are subject to removal for cause pursuant to enabling statutes for each board. *See, e.g.*, NEV. REV. STAT. § 630.050 (1991) (Board of Medical Examiners); and *id.* § 628.035 (Board of Accountancy); *id.* § 623.050 (Board of Architecture).

policy." 471 U.S. at 46 (1985). With regard to municipalities, the Court looked to the existence of other political and procedural safeguards and concluded that active state supervision was unnecessary to show fidelity to state policy. *Town of Hallie*, 471 U.S. at 47. Likewise, state political and procedural safeguards virtually eliminate the risk that state regulatory boards in the Amici States will engage in private price-fixing arrangements. As in *Town of Hallie*, this low risk is tolerable because of the requirement that state boards act pursuant to a clearly articulated state policy. The strict supervision requirement mandated by the Ninth Circuit decision is not necessary to control state board members and defeats important state regulatory policies.

III. THE NINTH CIRCUIT DECISION ADDS TO THE UNCERTAINTY OF STATE ACTION IMMUNITY FOR STATE BOARDS AND ILLUSTRATES THE NEED FOR GUIDANCE IN THIS AREA.

This Court has recently considered application of state action immunity to: purely private actors, *Patrick v. Burget*, 486 U.S. 94; state sovereign action, *Hoover v. Ronwin*, 466 U.S. 558 (1984); municipalities, *Town of Hallie*, 471 U.S. 34; and city councils, *City of Columbia*, 59 U.S.L.W. 4259. The Court has not addressed the application of state action immunity to state regulatory boards since the seminal decision in *Parker v. Brown*, 317 U.S. 341 (1943). *See Town of Hallie*, 472 U.S. at 46 fn.10 (1985). The lack of clear decisions from the circuit courts illustrates the need for guidance in this area. The circuit courts have struggled with the application of immunity to actors other than

purely public or purely private actors. Although the circuit courts generally reject the subjective test employed by the Ninth Circuit, the reasoning is unclear and offers little direction or predictability. *Hancock Industries v. Schaeffer*, 811 F.2d 225, 234-36 (3rd Cir. 1987) (rejects subjective motivation test for state agency actors based on prediction of future Supreme Court holding consistent with *Parker*); *Consol. T.V. Cable Serv. v. City of Frankfort*, 857 F.2d 354 (6th Cir. 1988) (rejects subjective motivation test on federalism grounds where municipal agent acted wrongfully, but actions were within the contemplation of state legislature); *see Buckley Const. v. Shawnee Civ. & Cultural Dev.*, 933 F.2d 853 (10th Cir. 1991) (rejects subjective motivation test, relying on *City of Columbia*).

Circuit cases involving determination of supervision requirements for actors that are neither purely public or purely private are no more instructive. *Benton, Benton & Benton v. La. Pub. Facil. Auth.*, 897 F.2d 198, 203-4 (5th Cir. 1990) *cert. denied* 111 S.Ct. 1619 (1991) (public corporation is not political subdivision of state but is "public agency" entitled to state action immunity without active state supervision); *Cine 42nd Street Theatre Corp. v. Nederlander Org.*, 790 F.2d 1032, 1047 (2nd Cir. 1986) (public corporation is political subdivision of state and, as such, is immune without active state supervision); *Fuchs v. Rural Elec. Conv. Co-op*, 858 F.2d 1210, 1217 (7th Cir. 1988) (electrical cooperative was not state agency or private actor but "hybrid entity" entitled to immunity with "lower level of supervision"). The Ninth Circuit's decision further confuses this already muddled area.

Direction from this Court about the proper characterization of state regulatory boards and the appropriate

level of supervision or procedural safeguards is needed in order to avoid a proliferation of litigation in this area. Without a determination from this Court, the uncertainty regarding liability for board members will continue, thereby damaging the Amici States' ability to conduct legitimate and necessary regulatory action. In light of the large number of affected regulatory boards and their vital public functions, clarification of the test for antitrust immunity is warranted.

CONCLUSION

Based upon the foregoing, the State of Washington's Petition for a Writ of Certiorari should be granted.

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